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answer that he was once remediless. Equity distinguishes between unfair, one-sided bargains, and fair, two-sided bargains which, because of wise policy of law, one party may elect to repudiate. Equity refuses to aid the former, but she would be untrue to herself if she made a preliminary disability in the latter, removable by election to proceed, pretext for staying her hand. Although all this is now generally well settled, confusion still arises from failure to distinguish from true lack of mutuality defenses grounded on the unfair consequences of specific performance. In granting the plaintiff the largest measure of equitable relief courts must look at the situation which a decree will create. It must not be such as to prejudice the defendant's chances of obtaining his equivalent. A ball-player must not be enjoined from playing on another team if, upon his later repentance and his manager's refusal again to employ him, he may find the decree has lost him his market. That the plaintiff in such cases takes nothing by his bill is due, not to the like-for-like doctrine of the old law, but to the unfair consequences to the defendant's position that might flow from the decree.

Some contracts, however, from their nature admit on one side of adequate remedy at law or in equity, but not on the other, as in the case of an agreement to supply a peculiar chemical compound.⁹ Nothing short of voluntary performance can cure the inherent infirmity of one party's position. But here it is argued that if specific performance to the plaintiff work no prejudice to the defendant's position, involve neither payment of consideration without security for the equivalent nor forfeiture of market, the defendant's plight must not restrain the chancellor. The bargain is of his own seeking. The decree will not add to his sorrows. Performance, though specifically decreed to the plaintiff, will be *pari passu*. Self-help will bar forfeiture, for if ever the plaintiff cease to perform, the defendant will be instantly discharged from operation of the decree. It is submitted that this is the true case of lack of mutuality of remedy. The machinery of equity is here working a real preference by giving the plaintiff the whip-hand. At pleasure he can drive on the bargain or elect to halt. The defendant's initiative is paralyzed. He must take his cue from the caprice of the plaintiff and damages at law cannot satisfy.¹⁰ It would seem that along with the non-weakening of the defendant's position there should also exist some compelling policy of public welfare to incline equity to increase this inequality between the parties by granting specific performance to the plaintiff.

"DUE PROCESS OF LAW" IN STATUTORY REMEDIES AGAINST UNINCORPORATED ASSOCIATIONS. — The inconvenience under modern business conditions of the common law doctrine that an unincorporated association, being merely a large partnership, can sue and be sued only in the names of all its individual members has led to much legislation altering more or less the common law procedure.¹ Some statutes provide for suits against associations (or partnerships) in the associate names, service of process on the officers or other associates, and judgments binding the associate property,

⁹ *Hills v. Croll*, 2 Phill. 60.

¹⁰ On this ground are most vulnerable such cases as *Lumley v. Wagner*, 1 De G. M. & G. 604, allowing specific performance of negative provisions collateral to affirmative contracts themselves unenforceable in equity.

¹ See Dicey, *Parties*, 148, 266.

but only those members individually who have been personally served.² These enactments seem unquestionably valid.³ A few states, however, have statutes similar, but providing for judgments binding individually even those members not personally served.⁴ Such a statute in Vermont was recently held not violative of the fourteenth amendment to the federal Constitution as involving the taking of property without due process of law. *Patch Mfg. Co. v. Capeless*, 63 Atl. Rep. 938.

In reaching this decision, the court lays stress, first, upon the analogy of the valid statutory liability of individual stockholders in corporations for corporate debts; and, secondly, upon the argument that the members of the association, in becoming such, impliedly contracted with reference to the statute and are bound by its provisions. The reasoning seems of doubtful validity. The statutory liability of stockholders in corporations is really assumed by them as one of the conditions upon which they will be created a corporate body at the will of the state.⁵ But the statutory liability of members of unincorporated associations is plainly not a voluntary sacrifice to gain a legislative gift of associate powers.⁶ The latter is the result of the exercise of general legislative powers; while the former always arises from the express provisions of a particular charter, or from provisions impliedly interpolated in all charters.⁷ Furthermore, while the date of the formation of the association in question does not appear, yet the statute plainly applies as well to associations already formed as to future ones.⁸ How, then, could the members of those associations formed prior to the enactment, "in becoming such, impliedly contract with reference to" statutory provisions perhaps not yet dreamed of?

Although these reasons fail to support the decision, yet, when the previous liabilities of members of unincorporated associations are considered, the enactment in question seems to involve no taking of property without due process of law. The members of such bodies when properly served with process have always been liable individually for the associate debts.⁹ Under the statute these liabilities are not at all increased. There has been merely a change in procedure, in the form of remedy. But the fourteenth amendment does not restrict "the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."¹⁰ Personal notice or service is not indispensable to "due process of law."¹¹ The question then resolves itself to this: does the service of process on the officers of an unincorporated association give the other members reasonable opportunity to defend? Since the officers are really agents of each of the members in transacting associate business, service of process on the officers as agents may well be considered reasonable notice

² Tex. Rev. Stat. 1895, § 1224; Minn. L. Rev. 1905, § 4068.

³ *Sugg v. Thornton*, 132 U. S. 524; *Gale v. Townsend*, 45 Minn. 357.

⁴ Vt. Stat. 1894, §§ 1099, 1183; S. C. Civ. Code, 1902, §§ 2229-2231.

⁵ See *Whitman v. Oxford, etc., Bank*, 176 U. S. 559; also *Mor., Private Corp.*, 2 ed., §§ 869, 870.

⁶ See *Mor., Private Corp.*, 2 ed., §§ 8, 878.

⁷ See *Barton, etc., Bank v. Atkins*, 72 Vt. 33; *Hampson v. Weare*, 4 Ia. 13.

⁸ Vt. L. 1882, No. 71, § 5.

⁹ See *Lawler v. Murphy*, 58 Conn. 294, 313.

¹⁰ See *Iowa, etc., Ry. Co. v. Iowa*, 160 U. S. 389, 393.

¹¹ See *Happy v. Mosher*, 48 N. Y. 313, 317.

to bind their principals, the other members. Besides, the members may easily provide for making the official knowledge of their officers their own. Certainly actual notice to each individual of hostile legal proceedings seems as sure here as in the common instances of service by publication and substituted service; yet the constitutionality of both these methods of serving process has often been upheld.¹² While the present decision seems the first on the exact point at issue, a similar result has been reached in the case of joint debtors;¹³ and the modern commercial instinct would surely tend towards the decision of the Vermont court.

RECOVERY AGAINST A FRAUDULENT DEFENDANT IN A SUIT BETWEEN PARTIES TO AN ILLEGAL CONTRACT. — As a general rule, parties to an illegal contract cannot maintain a suit either to enforce the contract or recover damages for its non-performance; or to recover money or property transferred to the defendant in accordance with its terms.¹ Certain exceptions to this rule, which do not depend upon the circumstances under which the illegal contract was made, but upon its very nature, concern this discussion but little and will be mentioned only for the sake of clearness. They are, roughly, cases where it is thought that public policy is best served by allowing recovery to one party who is deemed less in fault. Instances are cases of marriage brokerage,² and of statutes declaring certain contracts illegal, but imposing a penalty upon one party only.³

Turning now from cases where recovery if allowed depends upon the nature of the illegal contract, let us consider the cases where recovery is allowed in the particular suit before the court on account of the peculiar circumstances under which the illegal contract was formed, though apart from such circumstances no recovery would be allowed. Recovery may be had where the defendant occupied such a position that the plaintiff was accustomed to, and did, rely upon the defendant's judgment rather than upon his own, as in the cases of guardian and ward,⁴ and attorney and client.⁵ But even if there be such a relation, if the plaintiff acted upon his own judgment, he cannot recover.⁶ The question now arises whether we shall allow recovery where, without there being any such relation, the defendant has been guilty of fraud in inducing the plaintiff to enter into the contract or of fraud in the performance of it, though the plaintiff had full knowledge of the illegality. It will be seen that this is not a case analogous to the preceding established exception, for that must be based upon a theory of the plaintiff's lack of responsibility for the illegal contract, while in this case there can be no question on that score. The sole question raised here is whether or not the defendant's additional guilt can give basis for recovery by the plaintiff. But in no case, whether defendant was fraudulent or not, was there any question as to his liability, the fatal objection being as to the plain-

¹² *Mason v. Messenger*, 17 Ia. 261; *Continental, etc., Bank v. Thurber*, 74 Hun 632; *aff.* 143 N. Y. 648.

¹³ *Harker v. Brink*, 24 N. J. Law 333.

¹ *Stewart v. Thayer*, 170 Mass. 560.

² *Duval v. Wellman*, 124 N. Y. 156.

³ *Smart v. White*, 73 Me. 332; *Tracy v. Talmage*, 14 N. Y. 162.

⁴ *Hatch v. Hatch*, 9 Ves. 292; *cf.* *Boyd v. De la Montagnie*, 73 N. Y. 498.

⁵ *Ford v. Harrington*, 16 N. Y. 285.

⁶ *Roman v. Mali*, 42 Md. 513.